UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHRISTOPER D. WENGER and EILEEN MULLER, on behalf of themselves and others similarly situated, Plaintiffs, v. BOB'S DISCOUNT FURNITURE, LLC, Defendant.	CIVIL ACTION NO.: 3:14-cv-07707-PGS-LHG

PLAINTIFF'S BRIEF ON ISSUES RAISED *SUA SPONTE* AT THE DECEMBER 7, 2015 ORAL ARGUMENT ON DEFENDANT'S MOTION TO DISMISS

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I. The word "aggrieved" in TCCWNA, at N.J.S.A. 56:12-17 cannot mean "actually harmed" because such a definition cannot be harmonized with TCCWNA's other language, with TCCWNA's Legislative History, with case law applying TCCWNA, or with other New Jersey and federal statutes that use "aggrieved" to include those whose statutory rights have been invaded regardless of actual harm.

During oral argument on Defendant's Motion to Dismiss on December 7, 2015, the Court queried whether the term "aggrieved consumer" in TCCWNA at N.J.S.A. 56:12-17 requires that a consumer allege and prove actual harm to sustain a TCCWNA claim and requested supplemental briefing on the issue. Plaintiff respectfully submits that "aggrieved" cannot mean "actually harmed" for several reasons.

First, to define "aggrieved" as "actually harmed" cannot be harmonized with the N.J.S.A. 56:12-17's other language creating a right of action "to the aggrieved consumer for a civil penalty of not less than $100.00 ***or*** for actual damages, ***or*** both at the election of the consumer…" By using the disjunctive "or," the Legislature clearly signaled that the civil penalty is available whether or not the consumer suffered any actual damages from the violation.

Second, the notion that a consumer must suffer actual injury to be "aggrieved" is at odds with the Legislative history of the TCCWNA. On June 8, 1980, the Assembly Commerce Committee amended the pending bill into the TCCWNA's current form, and issued a Statement that read, in relevant part that:

> [N.J.S.A. 56:12-17], as amended by the committee, provides that a business which violates the provisions of this bill **would be liable to the aggrieved consumer for a civil penalty of not less than $100.00** ***if the consumer was not injured*** **by such a violation** and for a civil penalty and actual damages if he was injured by such a violation.

See Exh. A to this Brief, Statement to Assembly, No. 1660 (emphasis added). This leaves no doubt that “aggrieved” cannot mean “actually harmed."

Third, equating “aggrieved” with “actually harmed” is contrary to case law applying and interpreting TCCWNA. For example, in Shelton v. Restaurant.com Inc., 543 Fed. Appx. 168 (3d Cir. N.J. 2013), the Third Circuit ruled that the plaintiffs suffered no ascertainable loss from defendant's CFA violations (the inclusion of unlawful expiration periods in gift certificates), but yet reversed the district court's dismissal of the plaintiff's TCCWNA claims based on the same CFA violations. Id. at 170. This is obviously contrary to the notion that actual harm is required to sustain a TCCWNA claim. Similarly, in McGarvey v. Penske Auto. Group, 639 F. Supp. 2d 450, 457 (D.N.J. 2009)(reversed on other grounds at 486 Fed. Appx. 276, 279 (3d Cir. N.J. 2012)), the Court, while dismissing the plaintiff’s claims under the Magnuson Moss Warranty Act (MMWA) because of a lack of actual harm as required to sustain a claim under the MMWA's private action provisions, violation as required to sustain a private action under that statute (Id. at 457), but at the same time upheld the plaintiffs’ claims under TCCWNA based on the same MMWA violations, explaining that

> ...as a court in this District recently explained, "the NJTCC[WN]A can be violated if a contract or [warranty] simply contains a provision prohibited by state or federal law, and it provides a remedy even if a plaintiff has not suffered any actual damages." Barrows v. Chase Manhattan Mortg. Corp., 465 F.Supp.2d 347, 362 (D.N.J. 2006). If the Limited Warranty "contains a provision prohibited by [the MMWA]," id., therefore, Defendants may be held liable under the NJTCC[WN]A, even if Plaintiffs have not incurred actual damages.

McGarvey, supra, 639 F. Supp. 2d at 458. Also, in United Consumer Financial Services Co. v. Carbo, 410 N.J. Super. 280 (App.Div.2009), the court sustained TCCWNA claims based on contract provisions that imposed fees prohibited by the Retail Installment Sales Act (RISA), even though neither the plaintiff nor any other class members were in fact charged the prohibited fees and had no right of private action under RISA. Carbo, supra, 410 N.J. Super at 306-307.

Finally, the notion that "aggrieved" means "suffered actual harm" ignores the fact that numerous statutes have used "aggrieved" as a shorthand term to avoid having to use a more cumbersome phrase, such as "a person against whom the statute was violated." The word "aggrieved" has been used in exactly this way in the New Jersey Junk Fax Act, N.J.S.A. 56:8-159 (providing a right of action to "any person aggrieved by a violation of this act", with statutory damages of not less than $500 regardless of actual harm), the New Jersey Wiretapping Act, N.J.S.A. 2A:156A-1, *et seq.*, (defining "aggrieved person" as "a person who was a party to any intercepted wire, electronic or oral communication or a person against whom the interception was directed" (N.J.S.A. 2A:156A-2k)), and providing a right of action to such persons for minimum statutory damages even in the absence of actual harm. (N.J.S.A. 2A:156A-24; N.J.S.A. 2A:156A-32)); the New Jersey Uniform Commercial Code ("NJUCC"), N.J.S.A. 12A:1-201 (defining "aggrieved party" simply as "a party entitled to resort to a remedy.")

This shorthand use of "aggrieved" is also consistent with the definition of "aggrieved party" in Black's Law Dictionary (defining the term primarily as "A party entitled to a remedy" (*Black's Law Dictionary,* 8th Ed., 2004)).

In a case very closely on point, the New Jersey Appellate Division recently confirmed that "aggrieved", as used in the New Jersey Junk Fax Act (NJJFA), means nothing more than being the target of a violation of the statute. Oettinger v. Stevens Commer. Roofing, LLC, 2013 LEXIS 1854 (N.J. App.Div. July 24, 2013)(copy of decision attached as Exh. B to this Brief). In Oettinger, the defendant was charged with violating the NJJFA, N.J.S.A. 56:8-157, *et seq.*, which prohibits businesses from sending unsolicited faxes to a "person", and provides a private right of action to as follows:

> § 56:8-159. Action by aggrieved person
> a. Any person aggrieved by a violation of this act may bring an action in the Superior Court in the county where the transmission was sent or was received, or in which the plaintiff resides, for damages or to enjoin further violations of this act.
>
> b. The court shall proceed in a summary manner and shall, in the event the plaintiff establishes a violation of this act, enter a judgment for the actual

> damages sustained, or $500 for each violation, whichever amount is greater, together with costs of suit and reasonable attorney's fees.

The trial court in Oettinger dismissed the plaintiff's claim, "ruling that plaintiff failed to prove he was sufficiently 'aggrieved' to obtain damages" under the NJJFA. Oettinger, at *5.

The Appellate Division reversed, holding that "aggrieved' means nothing more than having received an unsolicited fax in violation of the statute:

> Turning to the cognate provisions in the NJJFA, we note that the term "aggrieved" is not defined in the statute. Therefore, we seek to construe that statutory term by considering the plain meaning of the language and the intent of the Legislature. See Levin v. Parsippany-Troy Hills, 82 N.J. 174, 182, 411 A.2d 704 (1980).
>
> As evidenced by the various definitions of "aggrieved" cited by the trial court and plaintiff, we conclude that, in the absence of legislative history and if one were to ignore the related federal statute, the word could potentially be used to mean either: (1) that a claimant is required to make a showing of actual harm to demonstrate that they have been "aggrieved," or (2) that a claimant is presumptively "aggrieved" when he or she is the recipient of a fax sent in violation of the NJJFA. That said, the legislative history, structure, and purposes of the NJJFA all lead us to conclude that the Legislature did not intend to inject an additional requirement of tangible harm for claimants seeking relief under the Act.
>
> [This is] consistent with the structure and purposes of the NJJFA. By offering claimants the greater of $500 or, alternatively, the actual damages suffered, the Legislature was clearly motivated by an objective to create a deterrent for those who would send unsolicited faxes, not just a desire to make victims of the practice whole.
>
> Given that the Legislature intended to create such a baseline deterrent, irrespective of the actual damages suffered by the recipient, we see no basis for distinguishing between who is entitled to exercise the private

> right of action, so long as a plaintiff is the recipient of a fax sent in violation of the statute. "Generally, courts presume that 'or' is used in a statute disjunctively unless there is clear legislative intent to the contrary." Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 21:14 (7th ed. 2009). Hence, the use of the disjunctive term "or" within the statutory text comports with an interpretation that a plaintiff under the statute shall receive $500 per fax, or, in the alternative, a higher sum in actual damages if they are provable. See Cox v. Sears Roebuck & Co., 138 N.J. 2, 19, 647 A.2d 454 (1994) (interpreting the Legislature's use of the word "or" in the Consumer [10] Fraud Act, N.J.S.A. 56:8-2, as evidence that the Legislature intended for the statute's requirement of "any unconscionable commercial practice, deception, fraud, . . . or the knowing concealment, suppression, or omission of any material fact" to be a disjunctive condition).

Oettinger, at *5-10.

The holding in Oettinger - that a claimant is "aggrieved" simply by virtue of receiving a prohibited document - is equally applicable to the TCCWNA, as the two statutes are remarkably similar, not just with respect to their provisions and language (with both statutes providing that a violation arises from a business's simple act of *sending* a violative document, and both providing a private action for a fixed statutory penalty *or* actual damages for those "aggrieved"), but also with respect to their clear common purposes of creating a deterrent to the dissemination of the proscribed documents. In fact the Legislature's intention to subject violators of the TCCWNA to liability without regard to actual injury to the consumer is even more pronounced than in the NJJFA in light of the Assembly Committee's decision to amend the bill to change the designation of the $100 payment from "statutory damages" to a "penalty". Da118. Turning again to Black's Law Dictionary, "statutory penalty" is defined as "a penalty imposed for a statutory violation; esp., a penalty imposing automatic liability on a wrongdoer for violation of a statute's terms without reference to any actual damages suffered." 8th Ed, 2004.

The two statutes also share similar legislative histories, indicating that a private action is available to those who received the proscribed documents regardless of any actual injury, *and without any indication that the Legislature intended any further limitations.* In Oettinger, the Court explained that

> Both the Committee Statement and the Sponsor's Statement accompanying the Assembly bill that became the NJJFA contained the following insightful explanation of the statute's implications: "A person violating the provisions of this bill would be subject to a penalty of not more than $500 per occurrence or the actual damages caused by the violation, whichever is greater for sending an unsolicited advertisement to a telephone fax machine." Assembly Commerce & Econ. Dev. Comm. Statement to Assembly Bill No. 669 (Sept. 23, 2004) (emphasis added); Sponsor's Statement to Assembly Bill No. 669 (Sept. 28, 2004). The statements of the committee and sponsor do not indicate a limit to the instances when a violator of the statute would be exposed to liability. Had the Legislature intended to create a cause of action only for claimants that could prove tangible harm beyond the receipt of each unsolicited fax, then the legislative statements presumably would have qualified their discussion by specifying that a person violating the statute would be subject to liability only in instances when the recipient is demonstrably harmed.

Oettinger, *at* *7-8. Similarly the Assembly Commerce Committee's Statement on the TCCNWA noted that:

> Section 4, as amended by the committee, provides that a business that violates the provisions of this bill would be liable to the aggrieved consumer for a civil penalty of not less than $100.00 ***if the consumer was not injured*** by such a violation and actual damages if he was injured by such a violation.[1]

This clearly indicates that the Legislature intended the TCCWNA to provide a right of action to any consumer who was the subject of a violation, even those who were "not injured." Echoing the Court's analysis of the NJJFA legislative history in Oettinger, if the Assembly Committee had intended to require that a TCCWNA claimant demonstrate that he or she suffered an "adverse effect" or demonstrate anything other than the receipt of the violative notice in order to have a remedy under TCCWNA, it "presumably would have qualified their discussion by specifying" as such. Oettinger, at 8.

II. Plaintiff takes no position on whether there is Article III standing for his TCCWNA claims, but if the Court decides there is not, Plaintiff is entitled to have this action remanded to State court where he initially filed it.

As the Plaintiff did not file his Complaint with this Court or seek this Court's jurisdiction to sue Defendant under TCCWNA, Plaintiff would not oppose a *sua*

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[1] In fact, the Assembly Committee's use of the word "the" in the statement, "a business that violates the provisions of this bill would be liable to *the* aggrieved consumer" shows that the Committee contemplated that *every* violation of TCCWNA necessarily *requires* an "aggrieved" consumer (i.e., the person to whom the contract or notice was offered or sent). Otherwise, the Committee would have said liable to "an aggrieved consumer" or "any aggrieved consumer."

sponte ruling from this Court that it lacks jurisdiction based on lack of Article III case-or-controversy standing. If the Court does so, this action should be remanded to the New Jersey Superior Court where it was originally filed. 28 USCS § 1447(C)("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. The State court may thereupon proceed with such case.") Article III "case or controversy" standing is a necessary basis for federal subject matter jurisdiction. Whitmore v. Arkansas, 495 U.S. 149, 154-55, (1990)("Article III, of course, gives the federal courts [subject matter] jurisdiction over only 'cases and controversies'"). Thus, if this Court finds no Article III standing, it is required to remand under 28 U.S.C. §1447(c). Moreover, this Court's determination of federal court standing under Article III of the United States Constitution would have no bearing on standing in New Jersey state court. *See* Crescent Park Tenants Asso. v. Realty Equities Corp., 58 N.J. 98, 101, 107 (N.J. 1971)(New Jersey has "a much more liberal approach on the issue of standing than have the federal cases" because "[u]nlike the Federal Constitution, there is no express language in New Jersey's Constitution which confines the exercise of our judicial power to actual cases and controversies...")

Although Plaintiff takes no position on the Article III standing issue raised by the Court, Plaintiff is mindful of the Court's request for briefing on the issue. To that end, Plaintiff notes that the Third Circuit has held there is Article III standing for "no harm" statutory damages claims. Alston v. Countrywide Fin. Corp., 585 F.3d 753, 763 (3d Cir. Pa. 2009)(For statutory damages claims under the federal Real Estate Settlement Procedures Act (RESPA) "a plaintiff need not demonstrate that he or she suffered actual monetary damages, because 'the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'")(citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 373, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982)). Plaintiff also notes that this issue is pending before the United States Supreme Court in Spokeo, Inc. v. Robins, Docket No. 13-1339, which was argued on November 2, 2015, and which will be decided in the upcoming months, at some time prior to the end of the Court's current session in early Summer 2016.

Respectfully submitted,

Dated: December 21, 2015

s/ Henry P. Wolfe____________
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putative Class